

**Aug 17, 2018**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KATHY ALLSTOT,

Plaintiff,

v.

CONFLUENCE HEALTH, a  
Washington non-profit corporation, and  
CENTRAL WASHINGTON HEALTH  
SERVICES ASSOCIATION, a  
Washington Public Benefit Corporation  
doing business as Central Washington  
Hospital,

Defendants.

No. 2:16-CV-00373-SMJ

**ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is the Motion for Summary Judgment, ECF No. 40, brought by Defendants Confluence Health (Confluence) and Central Washington Health Services Association (Central). Plaintiff Kathy Allstot asserts three causes of action—violation of the Family and Medical Leave Act of 1993 (FMLA), disability discrimination under the Washington Law Against Discrimination (WLAD), and wrongful discharge in violation of public policy. ECF No. 1 at 3–5. Allstot's first cause of action involves two claims, namely FMLA interference and FMLA

1 retaliation. Allstot's second cause of action involves three claims, namely WLAD  
2 disparate treatment, WLAD retaliation, and WLAD failure to accommodate.

3 Defendants ask the Court to grant summary judgment in their favor on all of  
4 Allstot's claims, arguing she failed to meet her burden of production on any of them.  
5 The Court held a hearing on the motion on August 2, 2018. Having reviewed the  
6 pleadings and the file in this matter, the Court is fully informed and, for the following  
7 reasons, grants the motion.

### 8 **BACKGROUND**

9 Central is a hospital in Wenatchee, Washington.<sup>1</sup> Allstot began working for  
10 Central as a nurse assistant in 2012. ECF No. 83 ¶¶ 1, 92. Allstot began taking  
11 FMLA leave for migraines from the start of her employment. *Id.* ¶ 54. To take FMLA  
12 leave, Confluence required employees to specifically request it. *Id.* ¶ 93. But Central  
13 advised employees to stay home if they were sick. *Id.* ¶ 99. And Confluence did not  
14 normally count medical leave for the flu against employees. *Id.* ¶ 103.

15 Allstot applied for a transfer to Central's contact center in 2014. *Id.* ¶ 2. As  
16 part of the transfer process, Allstot interviewed with the contact center manager,  
17 Kimberly Gullett. *Id.* Ultimately, Gullett was responsible for hiring Allstot into the  
18 contact center. *Id.* ¶ 3. In the interview, Allstot mentioned she experienced migraines

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20 <sup>1</sup> Confluence and Central appear to be affiliated as parent and subsidiary  
organizations, though their relationship is not clearly specified in the record. ECF  
No. 1 at 2; ECF No. 6 at 2.

1 and had previously taken FMLA leave. *Id.* ¶ 2. Gullett nonetheless approved  
2 Allstot's transfer to the contact center. *Id.* At all times relevant to this case, Gullett  
3 was unaware whether Allstot's migraines affected her ability to work. *Id.* ¶ 96.  
4 Allstot denies that her prescription medications affected her job performance. *Id.* ¶  
5 73.

6 Allstot started her job as a Contact Center Specialist I on September 30, 2014.  
7 *Id.* ¶ 5. Allstot's job required her to work a full-time dayshift on Monday through  
8 Friday from 9:00 a.m. to 6:00 p.m. *Id.* ¶¶ 6, 13. Allstot's duties involved taking  
9 telephone calls from patients, including calls transferred from Confluence operators;  
10 scheduling, canceling, and rescheduling patients' appointments with various  
11 Confluence healthcare providers; and arranging to refill patients' prescription  
12 medications. *Id.* ¶¶ 7–8, 105.

13 Allstot performed her job while seated at a cubicle, surrounded by a room of  
14 other cubicles and other contact center specialists. *Id.* ¶ 9. Incoming calls were  
15 placed in a queue and the first available contact center specialist would take the next  
16 call in the queue. *Id.* ¶ 10. A contact center specialist could not discern whether a  
17 call in the queue related to an emergency or nonemergency situation. *Id.* ¶ 67.  
18 Allstot's job placed her in continuous contact with patients. *Id.* ¶ 11. Allstot's job  
19 required her to comply with clinic and department standards pertaining to the use of  
20

1 paid time off and unpaid absences for medical reasons. *Id.* ¶ 12. Allstot could not  
2 perform her job unless she was physically present at the contact center. *Id.* ¶ 14.

3 Contact center specialists routinely received “huddles” describing new rules  
4 or changed rules for handling incoming calls. *Id.* ¶ 17. Things changed frequently.  
5 *See id.* An employee who missed work would make mistakes unless she took the  
6 time to go back and read all huddles before taking calls. *Id.* ¶ 18.

7 On April 3, 2015, Central coached Allstot on her job performance, reminding  
8 her to “[m]ake sure you are catching up on Huddles when you are not here,” to  
9 “[s]low down and take some time to make sure you are looking at the Scheduling  
10 grid and the restrictions per provider. Grids are changing all the time and with you  
11 being out of the office, things are getting missed.” *Id.* ¶ 19 (alterations in original).

12 Allstot had her six-month performance review on May 31, 2015. *Id.* ¶ 20. In  
13 the review, Gullett made the following observations about Allstot:

14 “I am finding the following errors are occurring repeatedly at times,  
15 due to her [Allstot] being out of the office: Sending Telephone  
16 Encounters and Staff Messages to the incorrect “Pools”. Booking  
17 patients based on the instruction or grid guidelines of when she was  
18 here in the office last. During her absences, we are constantly updating  
and changing things. I have spoken with Kathy and she is going to work  
on reading all huddles notes and emails from myself and Marcus Miller  
when she has been out, before she takes calls and books patients for  
future appointments. I think that this will alleviate these issues.”

19 *Id.* ¶ 21 (alteration in original).

1           On June 2, 2015, Central again coached Allstot on her job performance, this  
2 time for “‘rolling calls, taking below average number of calls, still sending  
3 Telephone Encounters and Staff Messages to the incorrect pools, taking long  
4 breaks/lunches,’ and having her phone ‘in work [mode] for an extended amount of  
5 time before going to breaks/lunches and leaving for the day.’” *Id.* ¶ 22 (alteration in  
6 original). Central cautioned Allstot she “‘must double check her work with the  
7 routing of all Telephone Encounter and Staff Messages’ and . . . ‘[w]hen she is  
8 scheduled on the phones, she needs to be in ‘Ready’ state to take calls.’” *Id.* ¶ 23  
9 (alteration in original). Central told Allstot her “‘failure to meet and maintain  
10 acceptable standards of performance ‘may result in a formal discipline process.’” *Id.*

11           Allstot’s errors persisted. *Id.* ¶¶ 24–28. For example, Allstot once scheduled  
12 a patient’s appointment for November 9, 2016 rather than 2015, which caused him  
13 to arrive at the clinic when no one was available to see him. *Id.* ¶ 24. Allstot admits  
14 there was nothing inappropriate about Gullett pointing out her errors regarding  
15 patient scheduling. *Id.* ¶ 29.

16           Central repeatedly coached Allstot about her errors. *Id.* ¶ 25. Gullett arranged  
17 extra training for Allstot. *Id.* ¶ 26. Gullett had a Contact Center Specialist II sit with  
18 Allstot for an entire day, observe how she was doing, and provide feedback on how  
19 she can improve. *Id.* Gullett also gave Allstot periodic in-person coaching from other  
20 contact center specialists. *Id.* ¶ 27. While Gullett also counseled other contact center

1 specialists who were making mistakes, Allstot does not know how many ended up  
2 receiving corrective action. *Id.* ¶ 31.

3 Allstot continued making mistakes even after going back and reading huddles.  
4 *Id.* ¶ 28. Eventually, Confluence’s practice managers asked Gullett to do more to  
5 address Allstot’s errors. *Id.* ¶ 30.

6 On October 29, 2015, Gullett issued Allstot a written counseling statement.  
7 *Id.* ¶ 32. In the statement, Gullett says, “[Allstot] continues to struggle with job  
8 performance. She has a high error rate and continues to take longer than the average  
9 number of total calls, taking longer breaks/lunches and is still continuing to have an  
10 extremely high amount of time in ‘Work State’, after counseling and coaching.” *Id.*  
11 ¶ 33. Gullett established expectations that Allstot’s “[e]rror rate needs to decrease  
12 down to no more than 5 errors in the next 30 days and moving forward’ and that she  
13 needed to take only ‘15 minutes each for breaks and 1 hour for lunches.’” *Id.* ¶ 34  
14 (alteration in original). Additionally, Gullett reminded Allstot her “[f]ailure to meet  
15 and maintain acceptable standards of performance . . . will result in further discipline  
16 up to and including termination of employment.” *Id.* ¶ 35 (alteration and omission  
17 in original).

18 On November 20, 2015, Central counseled Allstot about inappropriately  
19 referring to a patient as “a real witch.” *Id.* ¶ 36. And on December 2, 2015, Allstot  
20 cleaned out her desk because she thought Central was going to terminate her

1 employment. *Id.* ¶ 37. Allstot’s superiors never told her it was acceptable for her to  
2 keep making mistakes after receiving training, coaching, and counseling. *Id.* ¶ 38.

3 On January 11, 2016, Gullett told Allstot that she had “been taking long  
4 lunches lately,” that Gullett was “concerned with the amount of them,” and that  
5 Allstot needed “to be consistent at 1 hour lunches please.” *Id.* ¶ 72. Gullett suggested  
6 Allstot “[m]aybe set an alarm to help?” *Id.* (alteration in original).

7 On January 19, 2016, Gullett emailed Allstot, notifying her that Central  
8 discovered nine errors she made in the six weeks between November 27, 2015 and  
9 January 14, 2016. *Id.* ¶ 39. Three days later, Central presented Allstot with a last  
10 chance agreement. *Id.* ¶ 40. Confluence fires employees that do not sign such  
11 agreements. *Id.* ¶ 100. The agreement warned Allstot “[b]y signing this Last Chance  
12 Agreement you understand that ANY violation of CH’s work rules or policies . . .  
13 will result in your immediate termination from employment.” *Id.* ¶ 41 (alteration and  
14 omission in original). The agreement also warned Allstot “[t]here will be no further  
15 corrective action taken in the event of a performance, attitude or behavior problem,  
16 unapproved tardy, absence or policy violation.” *Id.* ¶ 42.

17 The last chance agreement referenced Allstot’s pattern of tardiness after  
18 returning from rest breaks and lunch breaks. *Id.* ¶ 44 (“From 12/3/15-1/12/16, Kathy  
19 has 13 occurrences of tardiness from rest breaks and from 12/9/15-1/11/16 she has  
20 an additional 10 occurrence of tardiness from lunch breaks. This behavior was

1 addressed on 6/2/15, 10/16/15-updated 11/4/15 and again on 1/11/16.”). But the  
2 agreement did not reference Allstot’s medical condition or FMLA leave. *Id.* ¶ 43.

3 Allstot knew Central would terminate her employment if she made any further  
4 mistake after signing the last chance agreement. *Id.* ¶ 45. The agreement was not just  
5 for attendance but for *any mistake*. *Id.* ¶ 46. Allstot’s errors persisted after she signed  
6 the last chance agreement. *Id.* ¶ 48. Thus, Allstot cleaned out her desk again the day  
7 after she signed the agreement. *Id.* ¶ 47. But Central did not, in fact, fire Allstot on  
8 that date. *See id.* ¶¶ 47, 50. Instead, Allstot continued working another thirty-nine  
9 days after signing the last chance agreement. *See id.* In that period, sometime in  
10 February 2016, Gullett informed Allstot she had received complaints about her job  
11 performance from patients. *Id.* ¶ 49. According to Allstot, Gullett also told Allstot  
12 she “was doing better” and “had nothing to worry about.” ECF No. 48-1 at 140.

13 Finally, Central terminated Allstot’s employment on March 1, 2016, telling  
14 her the reason for her discharge was that she continued to make errors. ECF No. 83  
15 ¶¶ 50, 51. Allstot’s discharge was based on her last chance agreement. *Id.* ¶ 101.  
16 Allstot acknowledged, “I was told due to my errors and lack of attention to detail  
17 that I wasn’t a good fit for that particular position at the Contact Center.” *Id.* ¶ 52.

18 During her tenure at the contact center, Allstot’s balance of available FMLA  
19 leave never ran down to zero. *Id.* ¶ 55. Moreover, Allstot’s superiors never told her  
20 she was unable to visit a doctor due to an insufficient balance of available FMLA



1 leave to cover the absence. *Id.* ¶ 58. Nonetheless, Allstot chose to schedule her  
2 medical appointments after hours to accommodate her job. *Id.* ¶ 102.

3 When Allstot was unsure about her balance of available FMLA leave, she  
4 would ask Brianna Thaut from Confluence’s human resources department. *Id.* ¶ 56.  
5 At one point, Thaut questioned the legitimacy of Allstot’s FMLA leave. ECF No.  
6 48-1 at 54, 222–23. Thaut was not part of Central’s decision to terminate Allstot’s  
7 employment nor was she ever consulted about that decision. ECF No. 83 ¶ 53.

8 In fall 2015, Central did not require Allstot to recertify her previously  
9 approved FMLA leave request. *Id.* ¶ 57. In early February 2016, Allstot requested  
10 recertification of intermittent FMLA leave for two reasons: (1) for her various  
11 chronic illnesses because she expected to need time off to attend appointments with  
12 various healthcare providers and address any problems that might arise, and (2) to  
13 care for her aging mother. *Id.* ¶¶ 59–60. Thaut handled Allstot’s request, which  
14 Central approved on February 25, 2016. *Id.* ¶¶ 61–62, 104. When Central terminated  
15 Allstot’s employment on March 1, 2016, she did not have any outstanding or  
16 unfulfilled requests to take FMLA leave. *Id.* ¶ 63.

17 Confluence had written policies regarding both attendance and absence  
18 notification, which applied to all Central employees including Allstot. *Id.* ¶¶ 65–66.  
19 Allstot reviewed both policies in her tenure at the contact center. *Id.* ¶ 68. Allstot  
20 admits she was sometimes tardy, explaining it was for reasons such as letting her

1 dogs out, going to the bank, or other reasons not related to her medical condition or  
2 FMLA leave. *Id.* ¶¶ 69–70. Allstot says her lunch breaks lasted longer than they  
3 should because she was “late probably leaving [her] house from letting the dogs  
4 out,” an occurrence which “has to do with traffic.” *Id.* ¶ 71. Many or all contact  
5 center employees were late to their shifts at one time or another. *Id.* ¶ 97. Some  
6 contact center employees were late multiple times but were not terminated. *Id.* ¶ 98.

7       On October 19, 2015, Allstot asked Central about the possibility of  
8 transferring to a part-time job. *Id.* ¶ 74. Central generally requires its part-time  
9 employees to comply with the same attendance and absence notification policies as  
10 full-time employees. *Id.* ¶ 75. Allstot originally transferred into the contact center  
11 because “it was just getting to be too much doing 12-hour shifts, three in a row, and  
12 trying to help [her] dad at home with [her] mother.” *Id.* ¶ 76.

13       Returning to her prior job as a nurse assistant would have required Allstot to  
14 routinely perform highly physical tasks such as lifting and dressing patients, helping  
15 patients with toilet activities, assisting with patient transport, and setting up and  
16 cleaning rooms. *Id.* ¶ 77. It also would have required continuous walking; frequent  
17 standing; reaching above shoulder height; and lifting, pulling, and pushing as much  
18 as fifty pounds. *Id.* But Allstot was not capable of performing any job involving  
19 lifting, such as what might be required of a nurse assistant. *Id.* ¶ 78. Within a month  
20 after her discharge, Allstot applied for disability benefits from the Social Security

Administration, claiming she was totally disabled and unable to work as of March 1, 2016, due to a back injury. *Id.* ¶ 79.

Allstot sued Defendants on October 24, 2016. ECF No. 1. Defendants moved for summary judgment on June 1, 2018. ECF No. 40. Allstot responded on June 22, 2018 and Defendants replied on July 6, 2018. ECF Nos. 46, 53. The Court heard the parties' oral argument on August 2, 2018.

### LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once a party has moved for summary judgment, the opposing party must point to specific facts establishing that there is a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make such a showing for any of the elements essential to its case for which it bears the burden of proof, the trial court should grant a summary judgment motion. *Id.* at 322. "When the moving party has carried its burden . . . , its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, "the nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (internal quotation marks omitted). When considering a summary judgment

1 motion, the Court does not weigh the evidence or assess credibility; instead, “[t]he  
2 evidence of the non-movant is to be believed, and all justifiable inferences are to be  
3 drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

## 4 **DISCUSSION**

### 5 **A. FMLA violation claims**

6 The FMLA prohibits interference with and retaliation for using or attempting  
7 to use protected leave. Allstot makes both claims.

#### 8 **1. FMLA interference claim**

9 The FMLA makes it “unlawful for any employer to interfere with, restrain,  
10 or deny the exercise of or the attempt to exercise, any right provided under this  
11 subchapter.” 29 U.S.C. § 2615(a)(1). An allegation that an employer violated this  
12 section is known as an FMLA “interference” claim. *Sanders v. City of Newport*, 657  
13 F.3d 772, 777–78 (9th Cir. 2011).

14 To establish a prima facie case of FMLA interference, an employee must  
15 show (1) she was eligible for the FMLA’s protections, (2) her employer was  
16 covered by the FMLA, (3) she was entitled to FMLA leave, (4) she provided  
17 sufficient notice of her intent to take FMLA leave, and (5) her employer denied her  
18 FMLA benefits to which she was entitled. *Id.* at 778. An employer violates the  
19 FMLA’s anti-interference provision if it “use[s] the taking of FMLA leave as a  
20 negative factor in employment actions.” *Bachelder v. Am. W. Airlines, Inc.*, 259

1 F.3d 1112, 1122–24 (9th Cir. 2001) (emphasis omitted) (quoting 29 C.F.R.  
2 § 825.220(c)).

3 Allstot cannot meet the fifth element of a prima facie case because she  
4 presents no evidence showing Defendants denied her FMLA benefits to which she  
5 was entitled. Indeed, the record shows she got every FMLA benefit she asked for.

6 Similarly, Allstot presents no evidence showing Defendants used her taking  
7 of FMLA leave as a negative factor in their employment actions. It is undisputed  
8 that Defendants fired Allstot because she violated her last chance agreement by  
9 continuing to be tardy and making an unacceptable rate of on-the-job errors.

10 Allstot asserts the recertification of intermittent FMLA leave five days before  
11 her discharge triggers an inference that the recertification was a negative factor in  
12 Defendants’ decision to fire her. The timing is not suspicious. Allstot’s extensive  
13 and freely granted FMLA leave in the four years she worked for Defendants belies  
14 her argument that the recertification in any way impacted their decision to fire her.  
15 *See Kelley v. Amazon.com, Inc.*, 652 F. App’x 524, 527 (9th Cir. 2016). Defendants  
16 were not required to refrain from enforcing the last chance agreement—a  
17 disciplinary course of action set in place before the recertification—simply because  
18 of the recertification. *See Swan v. Bank of Am.*, 360 F. App’x 903, 906 (9th Cir.  
19 2009). Under the totality of circumstances, the temporal proximity between the  
20 recertification and Allstot’s discharge is insufficient, standing alone, to trigger an

1 inference that the recertification was a negative factor in Defendants' decision to  
2 fire her. *See Dilettoso v. Potter*, 243 F. App'x 269, 272–73 (9th Cir. 2007); *Porter*  
3 *v. Cal. Dep't of Corr.*, 419 F.3d 885, 895 (9th Cir. 2005); *Coszalter v. City of Salem*,  
4 320 F.3d 968, 978 (9th Cir. 2003).

5 No genuine dispute exists regarding the episode in which Thaut questioned  
6 the legitimacy of Allstot's FMLA leave. This isolated incident occurred long before  
7 Defendants fired Allstot, a decision in which Thaut had no input and about which  
8 Defendants never consulted her.

9 Because Allstot fails to establish a prima facie case, the Court grants  
10 Defendants' summary judgment motion on Allstot's FMLA interference claim.

## 11 **2. FMLA retaliation claim**

12 The FMLA makes it “unlawful for any employer to discharge or in any other  
13 manner discriminate against any individual for opposing any practice made  
14 unlawful by this subchapter.” 29 U.S.C. § 2615(a)(2). An allegation that an  
15 employer violated this section is known as an FMLA “retaliation” claim. *Sanders*,  
16 657 F.3d at 777.

17 Under the *McDonnell Douglas* burden-shifting framework,<sup>2</sup> an employee  
18 must first establish a prima facie case of FMLA retaliation. *Sanders*, 657 F.3d at

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19  
20 <sup>2</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Ninth Circuit has  
not decided whether the *McDonnell Douglas* burden-shifting framework applies to  
FMLA retaliation claims. *Sanders*, 657 F.3d at 777; *Bachelder*, 259 F.3d at 1125

1 777 n.3. To establish a prima facie case of FMLA retaliation, an employee must  
2 show (1) she availed herself of a protected right under the FMLA, (2) she was  
3 adversely affected by an employment decision, and (3) a causal connection exists  
4 between the two actions. *Kelleher v. Fred Meyer Stores Inc.*, 302 F.R.D. 596, 598  
5 (E.D. Wash. 2014). If the employee establishes a prima facie case, the burden shifts  
6 to the employer to articulate a legitimate, nondiscriminatory reason for the adverse  
7 employment action. *Sanders*, 657 F.3d at 777 n.3. If the employer articulates a  
8 legitimate reason for the action, the employee must show the reason given is  
9 pretextual. *Id.* The employee can prove pretext either indirectly, by showing that  
10 the employer's proffered explanation is unworthy of credence because it is  
11 internally inconsistent or otherwise not believable, or directly, by showing that  
12 unlawful discrimination more likely motivated the employer. *Id.*

13 Allstot cannot meet the third element of a prima facie case because she  
14 presents no evidence establishing a causal connection between her taking of FMLA  
15 leave and Defendants' decision to fire her.

16 Even if Allstot could establish a prima facie case, her claim does not survive  
17 the *McDonnell Douglas* framework. Defendants articulated a legitimate,  
18  
19

20 n.11. But the parties agree it should apply. ECF No. 40 at 9; ECF No. 46 at 5; *see also Kelleher v. Fred Meyer Stores Inc.*, 302 F.R.D. 596, 598 (E.D. Wash. 2014).

1 nondiscriminatory reason for firing Allstot—she violated her last chance agreement  
2 by continuing to be tardy and make an unacceptable rate of on-the-job errors.

3 Allstot fails to show this reason is unworthy of credence, as required to  
4 demonstrate it is pretextual. Allstot argues the last chance agreement was itself  
5 retaliatory or otherwise illegal. She asserts it was imposed due to her taking of  
6 FMLA leave. This argument finds no support in the record. The last chance  
7 agreement does not mention Allstot’s absences. Allstot admits she was sometimes  
8 tardy for non-disability-related reasons such as her own personal choices. And  
9 undisputed evidence shows Allstot continued to make errors. Critically, Allstot  
10 presents no evidence that her tardiness or error issues were due to her disability.  
11 While Allstot claims other non-disabled employees with tardiness or error issues  
12 were not fired like she was, she fails to show they signed last chance agreements  
13 like her. Thus, Allstot’s argument that her violation of the last chance agreement  
14 was a pretextual reason for firing her is baseless.

15 Because Allstot fails to establish a prima facie case and fails to show the  
16 reason given for her discharge was pretextual, the Court grants Defendants’  
17 summary judgment motion on Allstot’s FMLA retaliation claim.

18 **B. WLAD claims**

19 The WLAD prohibits all disability discrimination, including disparate  
20 treatment, retaliation, and failure to accommodate. Allstot makes all three claims.



1           **1.     WLAD disparate treatment claim**

2           The WLAD makes it “an unfair practice for any employer . . . [t]o discharge  
3 or bar any person from employment because of . . . the presence of any sensory,  
4 mental, or physical disability.” Wash. Rev. Code (RCW) § 49.60.180(2).  
5 Nevertheless, “the prohibition against discrimination because of such disability  
6 shall not apply if the particular disability prevents the proper performance of the  
7 particular worker involved.” RCW 49.60.180(1).

8           To establish a prima facie case of WLAD disability discrimination based on  
9 disparate treatment, an employee must show she was “[1] disabled, [2] subject to  
10 an adverse employment action, [3] doing satisfactory work, and [4] discharged  
11 under circumstances that raise a reasonable inference of unlawful discrimination.”  
12 *Brownfield v. City of Yakima*, 316 P.3d 520, 533 (Wash. Ct. App. 2014) (alterations  
13 in original) (quoting *Callahan v. Walla Walla Hous. Auth.*, 110 P.3d 782, 786  
14 (Wash. Ct. App. 2005)). The employee “must establish specific and material facts  
15 to support each element of . . . her prima facie case.” *Anica v. Wal-Mart Stores, Inc.*,  
16 84 P.3d 1231, 1236 (Wash. Ct. App. 2004).

17           The *McDonnell Douglas* burden-shifting framework applies in this context.  
18 “An employee claiming discrimination must first prove a prima facie case of  
19 discrimination and, if he or she does so, then the burden shifts to the employer to  
20 present evidence suggesting a nondiscriminatory reason for [the termination].”

1 *Brownfield*, 316 P.3d at 533 (alteration in original) (quoting *Swinford v. Russ*  
2 *Dunmire Oldsmobile, Inc.*, 918 P.2d 186, 193 (Wash. Ct. App. 1996)). “If the  
3 employer sustains its burden, the employee must then demonstrate that the reasons  
4 given by the employer are pretext for discrimination.” *Id.* (quoting *Swinford*, 918  
5 P.2d at 193).

6 Allstot cannot meet the third element of a prima facie case because she fails  
7 to show she was doing satisfactory work. Allstot admits she was sometimes tardy  
8 for non-disability-related reasons such as her own personal choices. And undisputed  
9 evidence shows Allstot continued to make errors. “An employee’s assertion of good  
10 performance to contradict the employer’s assertion of poor performance does not  
11 give rise to a reasonable inference of discrimination.” *Chen v. State*, 937 P.2d 612,  
12 617 (Wash. Ct. App. 1997); *cf. Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267,  
13 270 (9th Cir. 1996) (“[A]n employee’s subjective personal judgments of her  
14 competence alone do not raise a genuine issue of material fact.”).

15 Additionally, Allstot cannot meet the fourth element of a prima facie case  
16 because she fails to show Defendants discharged her under circumstances raising a  
17 reasonable inference of unlawful discrimination. An employee must meet the  
18 “substantial factor” test of causation, which requires showing her disability was a  
19 substantial factor causing discrimination. *Brownfield*, 316 P.3d at 532 (quoting *Fell*  
20 *v. Spokane Transit Auth.*, 911 P.2d 1319, 1328 (Wash. 1996)). But Allstot presents

1 no evidence suggesting her medical condition was a substantial factor in  
2 Defendants' decision to fire her.

3 Even if Allstot could establish a prima facie case, her claim does not survive  
4 the *McDonnell Douglas* framework for all the same reasons as her FMLA  
5 retaliation claim.<sup>3</sup>

6 Because Allstot fails to establish a prima facie case and fails to show the  
7 reason given for her discharge was pretextual, the Court grants Defendants'  
8 summary judgment motion on Allstot's WLAD disparate treatment claim.

## 9 **2. WLAD retaliation claim**

10 The WLAD makes it "an unfair practice for any employer . . . to discharge,  
11 expel, or otherwise discriminate against any person because he or she has opposed  
12 any practices forbidden by this chapter." RCW 49.60.210(1).

13 To establish a prima facie case of WLAD disability discrimination based on  
14 retaliation, an employee must show (1) she engaged in statutorily protected activity,  
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16 <sup>3</sup> "A court may grant summary judgment even though the plaintiff establishes a  
17 prima facie case and presents some evidence to challenge the defendant's reason  
18 for its action." *Tyner v. State*, 154 P.3d 920, 928–29 (Wash. Ct. App. 2007) (quoting  
19 *Milligan v. Thompson*, 42 P.3d 418, 423 (Wash. Ct. App. 2002)). "[W]hen the  
20 record conclusively revealed some other, nondiscriminatory reason for the  
employer's decision, or if the [employee] created only a weak issue of fact as to  
whether the employer's reason was untrue and there was abundant and  
uncontroverted independent evidence that no discrimination had occurred,  
summary judgment is proper." *Id.* at 929 (internal quotation marks omitted)  
(quoting *Milligan*, 42 P.3d at 423).

1 (2) she suffered an adverse employment action, and (3) a causal link exists between  
2 her activity and her employer's adverse action. *Tyner v. State*, 154 P.3d 920, 928  
3 (Wash. Ct. App. 2007).

4 The *McDonnell Douglas* framework applies in this context. ““If the employee  
5 makes out a prima facie case, the burden shifts to the employer to show a legitimate,  
6 nondiscriminatory basis’ for its actions.” *Id.* (quoting *Milligan v. Thompson*, 42  
7 P.3d 418, 423 (Wash. Ct. App. 2002)). “This shifts the burden back to the  
8 [employee] to prove that the employer’s reason is pretextual.” *Currier v. Northland*  
9 *Servs., Inc.*, 332 P.3d 1006, 1011 (Wash. Ct. App. 2014). “The trier of fact must  
10 then ‘choose between inferences when the record contains reasonable but  
11 competing inferences of both discriminatory and nondiscriminatory actions.’” *Id.*  
12 (quoting *Burchfiel v. Boeing Corp.*, 205 P.3d 145, 153 (Wash. Ct. App. 2009)).

13 Allstot cannot meet the first element of a prima facie case because she fails  
14 to show she engaged in statutorily protected activity opposing workplace  
15 discrimination. The WLAD “provides protection . . . when an employee opposes  
16 forbidden practices.” *Lodis v. Corbis Holdings, Inc.*, 292 P.3d 779, 787 (Wash. Ct.  
17 App. 2013). “The term ‘oppose,’ undefined in the [WLAD], carries its ordinary  
18 meaning: ‘to confront with hard or searching questions or objections’ and ‘to offer  
19 resistance to, contend against, or forcefully withstand.’” *Id.* (quoting *Webster’s*

1 *Third New International Dictionary* 1583 (2002)). Allstot presents no evidence she  
2 did anything of the sort.

3       Additionally, Allstot cannot meet the third element of a prima facie case  
4 because she fails to show a causal link exists between some protected activity and  
5 her discharge. “A plaintiff proves causation by showing that retaliation was a  
6 substantial factor motivating the adverse employment action.” *Currier*, 332 P.3d at  
7 1011. But Allstot presents no evidence showing retaliation was a substantial factor  
8 in Defendants’ decision to fire her.

9       Even if Allstot could establish a prima facie case, her claim does not survive  
10 the *McDonnell Douglas* framework for all the same reasons as her FMLA  
11 retaliation claim and WLAD disparate treatment claim.

12       Because Allstot fails to establish a prima facie case and fails to show the  
13 reason given for her firing was pretextual, the Court grants Defendants’ summary  
14 judgment motion on Allstot’s WLAD retaliation claim.

### 15       **3. WLAD failure to accommodate claim**

16       The WLAD “requires an employer to reasonably accommodate an employee  
17 with a disability unless the accommodation would pose an undue hardship.” *Frisino*  
18 *v. Seattle Sch. Dist. No. 1*, 249 P.3d 1044, 1049 (Wash. Ct. App. 2011). “[A]n  
19 employer is not required to reassign an employee to a position that is already  
20

1 occupied, create a new position, or eliminate or reassign essential job functions.”

2 *Id.*

3 To establish a prima facie case of WLAD failure to accommodate, an  
4 employee must show (1) she had a sensory, mental, or physical abnormality that  
5 substantially limited her ability to perform her job; (2) she was qualified to perform  
6 the essential functions of her job; (3) she gave her employer notice of her  
7 abnormality and its accompanying substantial limitations; and (4) upon notice, her  
8 employer failed to affirmatively adopt measures that were available to it and  
9 medically necessary to accommodate her abnormality.” *Anica*, 84 P.3d at 1236–37.

10 “Where multiple potential modes of accommodation exist, the employer is  
11 entitled to select the mode; the employee is not.” *Frisino*, 249 P.3d at 1050. “The  
12 employer then has the right to stand on its mode of accommodation, to the exclusion  
13 of other choices, if the accommodation is adequate.” *Id.* “If the attempted  
14 accommodation is not adequate, the employer may attempt another mode of  
15 accommodation, or assert that the remaining available modes of accommodation  
16 constitute an undue hardship.” *Id.* The primary inquiry is “whether the [employer]’s  
17 attempt at accommodation was effective in removing the cause of the substantially  
18 limiting symptoms.” *Id.* Once an employer reasonably accommodates an employee,  
19 the employer “d[oes] not have a further responsibility to accommodate [the

1 employee] until she g[ives] sufficient notice of her need for further  
2 accommodation.” *Anica*, 84 P.3d at 1237.

3 Allstot does not specify what else she believes Defendants could or should  
4 have done for her. Allstot fails to show Defendants had any other measures available  
5 to accommodate her medical condition. Because Allstot’s job was designed to meet  
6 Defendants’ specific contact center needs during business hours, they could not be  
7 expected to change when she worked or what she did during work, nor could they  
8 be expected to make attendance anything other than mandatory. Defendants had no  
9 other available job that Allstot could perform. And Defendants were not required to  
10 create a new job for Allstot, whether part-time or otherwise.

11 Moreover, Allstot fails to show any other measures were medically necessary  
12 to accommodate her condition. At oral argument, Allstot’s attorney acknowledged  
13 he is not aware of any evidence showing she needed part-time work. No genuine  
14 dispute exists regarding the effectiveness of the measures Defendants took, which  
15 included schedule modifications to accommodate her needs as they arose. And  
16 Allstot never notified Defendants of her need for further accommodation.

17 Because Allstot fails to establish a prima facie case, the Court grants  
18 Defendants’ summary judgment motion on Allstot’s WLAD failure to  
19 accommodate claim.

1 **C. Wrongful discharge claim**

2 “Washington provides a private common law tort remedy when an employer  
3 discharges an at-will employee ‘for a reason that contravenes a clear mandate of  
4 public policy.’” *Becker v. Cmty. Health Sys., Inc.*, 332 P.3d 1085, 1088 (Wash. Ct.  
5 App. 2014) (quoting *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash.  
6 1984)), *aff’d*, 359 P.3d 746 (Wash. 2015). This tort is “‘narrow,’ meaning the  
7 employee has the burden of proving the dismissal violates a clear mandate of public  
8 policy.” *Rickman v. Premera Blue Cross*, 358 P.3d 1153, 1158 (Wash. 2015)  
9 (quoting *Thompson*, 685 P.2d at 1089).

10 “To state a cause of action, the plaintiff must plead and prove that his or her  
11 termination was motivated by reasons that contravene an important mandate of  
12 public policy.” *Becker v. Cmty. Health Sys., Inc.*, 359 P.3d 746, 749 (Wash. 2015).  
13 This includes “a strict clarity requirement in which the plaintiff must establish that  
14 the public policy is clearly legislatively or judicially recognized.” *Id.* “Once  
15 established, the burden shifts to the employer to plead and prove that the employee’s  
16 termination was motivated by other, legitimate, reasons.” *Id.*

17 This tort usually arises in one of several scenarios, such as “when employees  
18 are fired for exercising a legal right or privilege.” *Rose v. Anderson Hay & Grain*  
19 *Co.*, 358 P.3d 1139, 1147 (Wash. 2015). In other instances where the facts do not  
20



1 fit neatly into a typical category, “a more refined analysis may be necessary” and  
2 the Court obtains guidance from the following four-part framework:

3 (1) the existence of a “clear public policy” (clarity element), (2)  
4 whether “discouraging the conduct in which [the employee] engaged  
5 would jeopardize the public policy” (jeopardy element), (3) whether  
6 the “public-policy-linked conduct caused the dismissal” (causation  
7 element), and (4) whether the employer is “able to offer an overriding  
8 justification for the dismissal” (absence of justification element).

9 *Id.* at 1143, 1147 (alteration in original) (quoting *Gardner v. Loomis Armored, Inc.*,  
10 913 P.2d 377, 382 (Wash. 1996)).

11 The employee must meet the “substantial factor” test of causation, which  
12 requires showing “the employee’s conduct in furthering a public policy was a  
13 substantial factor motivating the employer to discharge the employee.” *Rickman*,  
14 358 P.3d at 1160 (internal quotation marks omitted).

15 By contrast, “[t]he ‘absence of justification’ element examines whether the  
16 employer can ‘offer an overriding justification for the [discharge],’ ‘despite the  
17 employee’s public-policy-linked conduct.’” *Id.* (second alteration in original)  
18 (citation omitted) (quoting *Gardner*, 913 P.2d at 385). “Once a plaintiff presents a  
19 prima facia [sic] case . . . , the burden of proof shifts to the employer to show the  
20 termination was justified by an overriding consideration.” *Id.*

21 Allstot’s wrongful discharge claim fails for the same reasons as her other  
22 claims. *Cf. Becker v. Cashman*, 114 P.3d 1210, 1215 (Wash. Ct. App. 2005)

1 (affirming summary judgment on a claim of wrongful discharge in violation of  
2 public policy premised on the same facts and suffering the same deficiency as a  
3 claim of disability discrimination under the WLAD lacking evidence of causation).

4 Because Allstot fails to establish a prima facie case and Defendants offer an  
5 overriding justification for firing her, the Court grants Defendants' summary  
6 judgment motion on Allstot's wrongful discharge claim.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 **1. Defendants' Motion for Summary Judgment, ECF No. 40, is**  
9 **GRANTED.**

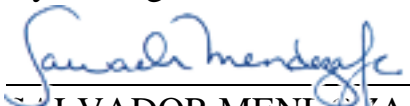
10 **2. All pending motions are DENIED AS MOOT.**

11 **3. All hearings and other deadlines are STRICKEN.**

12 **4. The Clerk's Office is directed to ENTER JUDGMENT for**  
13 **Defendants and CLOSE this file.**

14 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
15 provide copies to all counsel.

16 **DATED** this 17th day of August 2018.

17   
18 **SALVADOR MENDOZA, JR.**  
19 **United States District Judge**  
20